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In the Supreme Court of the United States

OCTOBER TERM, 1968

JOSEPH AMABILE,

Petitioner,

vs.

THE UNITED STATES OF AMERICA,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

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In the Supreme Court of the United States

OCTOBER TERM, 1967

NO.

JOSEPH AMABILE,

Petitioner,

vs.

THE UNITED STATES OF AMERICA,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

The Petitioner, Joseph Amabile, prays that a writ of certiorari be issued to review the judgment of the United States Court of Appeals for the Seventh Circuit, entered in this cause on April 26, 1968.

OPINIONS BELOW

The majority and dissenting opinions of the Court of Appeals (not yet reported) are reprinted as Appendix A, *infra*. The majority and dissenting opinions of the Court

of Appeals in the related, but separate, appeals of Petitioner's co-defendants at trial (United States vs. Battaglia and Evans, Nos. 16312 and 16313 in the United States Court of Appeals for the Seventh Circuit) (not yet reported) are reprinted as Appendix B, *infra.*

JURISDICTION

The judgment of the Court of Appeals (Appendix C, *infra*) was entered on April 26, 1968. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

I. Whether it is a violation of the Hobbs Act (18 U.S.C. Section 1951) to extort money from a businessman whose business receives supplies shipped in interstate commerce where the threat of extortion is to injure the businessman and members of his family but does not carry with it, express or implied, a further threat to obstruct, delay or affect any aspect of the business, and the only effect claimed is the depletion of the assets of the business by reason of a subsequent payment of money?

II. Whether proof that alleged co-conspirators combined and agreed with Petitioner in a scheme to defraud is a sufficient basis from which to infer that they also agreed to commit extortion, where there is no evidence that they knew or approved of Petitioner's unilateral act of threatening the victim and the entire scheme had previously been conducted by trickery and deceit rather than by violence or threat of violence? And whether, if the answer to the foregoing is in the negative, Petitioner could be convicted of conspiring to violate the Hobbs Act in the absence of evidence that he agreed with anyone to threaten the victim?

III. Whether refusal to allow Petitioner to inquire on cross examination of the principal Government witness if he was a defendant in a pending state court indictment for a felony, if he was being investigated for income tax evasion, and if he expected favorable treatment in these matters in consideration for his testimony, all for the purpose of showing motive, deprived Petitioner of the right of cross examination guaranteed by the Sixth Amendment? Whether Petitioner was deprived of this same Sixth Amendment right by the ruling of the trial judge prohibiting him from asking this witness to point out, in a pre-trial statement given to agents for the Government, where complaint of certain specific threats, about which the witness had testified, had been recorded after the witness had answered that the complaint was contained in the statement; and, in prohibiting him from asking the witness if he had made this complaint in four other statements given to the Government agents?

IV. Whether Petitioner was properly denied access to the minutes of the grand jury testimony of certain key Government witnesses, and whether a new procedure, granting defendants access to such minutes as a matter of right, may be limited to prospective cases?

The foregoing questions are discussed in this petition. Questions V and VI which follow are reserved for argument on the merits in connection with related questions presented.

V. Whether Petitioner was deprived of his right of cross examination by the ruling of the trial judge prohibiting the defense from ascertaining the address of the principal Government witness?

VI. Whether evidence of threats, made one to two years prior to the commencement of the alleged conspiracy, by another, known to the Grand Jury and not alleged to be a co-conspirator, were relevant?

CONSTITUTIONAL PROVISIONS AND STATUTE INVOLVED

Sixth Amendment, Constitution of the United States, provides in pertinent part:

> "In all criminal prosecutions, the accused shall enjoy the right * * * to be confronted with the witnesses against him; * * *"

Section 1951, Title 18, United States Code, provides:

> "*Interference with commerce by threats of violence.*
>
> (a) Whoever in any way or degree obstructs, delays, or affects commerce or the movement of any article or commodity in commerce, by robbery or extortion or attempts or conspires so to do, or commits or threatens physical violence to any person or property in furtherance of a plan or purpose to do anything in violation of this section shall be fined not more than $10,000 or imprisoned not more than twenty years or both.
>
> "(b) As used in this section—
>
> "(1) The term 'robbery' means the unlawful taking or obtaining of personal property from the person or in the presence of another, against his will, by means of actual or threatened force, or violence, or fear of injury, immediate or future, to his person or property, or property in his custody or possession, or the person or property of a relative or member of his family or of anyone in his company at the time of the taking or obtaining.

"(2) The term 'extortion' means the obtaining of property from another, with his consent, induced by wrongful use of actual or threatened force, violence, or fear, or under color of official right.

"(3) The term 'commerce' means commerce within the District of Columbia, or any Territory or Possession of the United States; all commerce between any point in a State, Territory, Possession, or the District of Columbia and any point outside thereof; all commerce between points within the same State through any place outside such State; and all other commerce over which the United States has jurisdiction."

STATEMENT

Petitioner Joseph Amabile together with Salvatore Battaglia[1] and Dave Evans[2] were indicted by the United States Grand Jury for conspiracy to violate the Hobbs Act (18 U.S.C. Section 1951). The one-count indictment charged that, beginning in or about July, 1964, the three named defendants, an unindicted co-conspirator, Rocco Pranno, and others unknown to the Grand Jury conspired to obstruct, delay and affect interstate commerce by extorting $48,500 from the Riley Management Corporation, a firm engaged in the construction of multiple dwelling units ("King Arthur Apartments") in Lansing, Illinois. The indictment, containing requisite allegations that "the movement in interstate commerce of materials, supplies, and other commodities required for the construction, sale, rental and management of said multiple dwelling units" was to

[1]Appellant in No. 16312 in the Court below; Petitioner in No. ....., October Term, 1967.

[2]Appellant in No. 16313 in the Court below; Petitioner in No. ....., October Term, 1967.

be obstructed, delayed and affected, alleged that the conspiracy continued to the date of the return of the indictment, February 16, 1967. (I App. 2, 19-21)[3]

Following trial by jury, the defendants were all found and adjudged guilty. Petitioner was sentenced to the custody of the Attorney General for a term of fifteen years and to pay a fine of $10,000. (I App. 91-2) In separate opinions[4] the Court of Appeals affirmed all convictions by a two to one vote.

The following facts are grouped in the same order as the corresponding reasons for granting the writ to which they are pertinent.

I. A threat of extortion must have a reasonable causal relation to interstate commerce in order to violate the Hobbs Act.

Background of original scheme to obtain money "by fraud and deceit."[5]

During the years 1964 and 1965, William Riley was the president and principal stockholder of the Riley Manage-

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[3] "App." references are to the volume and page of the Joint Appendix for Appellants as printed for the Court of Appeals.

[4] The appeals of Battaglia and Evans were heard together and decided in an opinion filed January 9, 1968. Their Petitions for Rehearing and Suggestions that Rehearing be heard *en banc* were denied April 17, 1968. Petitioner's appeal was heard separately and decided, by the same three-judge panel, in an opinion filed April 26, 1968. No Petition for Rehearing was filed in response to this judgment. The majority opinion in each case was written by Judge Cummings and concurred in by Judge Schnackenberg. Judge Swygert wrote a dissenting opinion in each case.

[5] The phrase is Judge Swygert's. See, App. B, *infra*, p. App. 55.

ment Corporation, a company engaged in real estate development, construction of apartment projects, and the rental and management of such properties. (II App. 489-90) In June 1964, Riley told defendant Evans, eventually his construction superintendent for the project, to begin lining up subcontractors for construction about to be started in Lansing, Illinois. Evans was cautioned to keep the project a secret from Petitioner and one Nick Palermo, for Riley was fearful that he would be forced to use their services if they learned of it. (II App. 502)

A few days after that conversation, Riley met with Palermo and Petitioner in the office of Palermo's Melrose Park Plumbing Company. Palermo asked for an opportunity to bid on the plumbing contract for the Lansing project. Riley demurred. Petitioner then told Riley that, if he did not give them the work, he would stop other Riley projects in Northlake and Westmont, Illinois, and they would put him out of business. Amabile said he knew how to handle "wise guys" and Riley "would be walking the streets with a candy cane." He also said he knew where Riley's mother lived, where his kids went to school, and they had a baseball bat to handle "wise guys" like Riley. (II App. 506-7)

Shortly thereafter Riley told Evans about the meeting with Amabile and Palermo, adding that he was disgusted and frightened that they had learned of the impending Lansing project. He reiterated, however, that he could not use them and told Evans, if he were contacted by them, to pretend to give them work, but not to do so.[6] (II App. 511-12)

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[6] Eventually, however, in September or October 1964, Riley gave the Lansing plummbing contracts to Palermo because, as he testified, he was afraid of Amabile and Palermo. He explained that he feared economic ruin, that his existing projects in Northlake and West-

Riley had another conversation with Evans, in June, July or August 1964. At this time he informed Evans that he had borrowed sufficient funds to begin the underground work on the Lansing project and instructed him to obtain a good sewer contractor, one who was "foreign" to Amabile and Palermo. (II App. 515) At about the same time, Amabile told one Mike DiVito and alleged co-conspirator Rocco Pranno that he and Riley had purchased some property in Lansing and they had a number of buildings under construction. Amabile explained that a lot of building, sewer and water main construction, and paving was being done. DiVito inquired whether he could obtain some of the sewer and water main work, and Amabile answered that it was possible, but, if he did, Amabile did not want DiVito's name associated with the contracts. (I App. 120-1)

At a subsequent meeting Petitioner told Pranno and DiVito, in response to a further inquiry from them, that they could get the sewer and water main contract if they

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mont, Illinois, would be stopped, and that physical harm would come to his family and employees. (II App. 508-11) The Northlake project had already been completed at this time, however. (I App. 122, 127, 249)

Palermo, although well-known to the Grand Jury at the time of the return of the instant indictment, as evidenced by the Grand Jury's simultaneous return of an indictment charging him with a similar offense against Riley, was not charged as a defendant or as a co-conspirator non-defendant in the instant case. It is not clear just what significance "giving the contract" to Palermo had for the instant case, nor is it clear what contracts were given. Riley testified he gave the contract to "Melrose Park Plumbing, Melrose Park Electric, Melrose Park Heating, Melrose Park Painting, Melrose Park et cetera, et cetera." (II App. 513) It is clear, however, that Palermo was not given the sewer contract in conjunction with which the charged extortion of $48,500 took place. See, text, pp. 9-10, *infra.*

came up with a "good clean fellow" to do the work for them. (I App. 123-24) In September 1964, Pranno and DiVito hired one Henry LaKey as president of Carlson Construction and Equipment Company, a firm to be organized to meet the requirements for the Lansing project. (App. 125-27)

Subsequently in September, according to one version, DiVito, Evans, Pranno and Amabile met in the latter's apartment to discuss the sewer contract for the Lansing project. Pranno told Amabile they had LaKey to do the work for them. Amabile assented, but demanded $20,000 in cash before giving them the job. After looking at the plans, specifications and figures which Evans then provided, DiVito advised Pranno that they would be able to pay this amount. Thereupon Pranno told Amabile he would give him the $20,000 in cash, and Amabile accepted. Afterwards, Pranno told DiVito never to say anything in front of Evans because he was Amabile's "guy" and it would get back to him. (I App. 128-29)

According to LaKey's version, he — and not Pranno — was present at this meeting. Amabile said to DiVito: "Mike, I'm giving you this job. I want this job done right. I don't want no problems with this job and I don't want no trouble with it. I can give the job to anybody I want, but I'm giving it to you and Jimmy [Pranno]. I don't care about nothing else, I get my 20 grand off the top." (I App. 254-56) DiVito and LaKey returned to Pranno who, when Amabile's demand was conveyed to him, told DiVito he would talk to him about it at another time. (I App. 261)

In September Evans told Riley he had procured an excellent sewer contractor, Carlson Construction Company, operated by a Mr. LaKey, to do the work in Lansing.

Riley inquired about LaKey's reputation and ability, and Evans assured him that the company's reputation was excellent and that it could do the job: (II App. 516)

The Carlson Construction and Equipment Company was formed in October, 1964. LaKey, the president, received a 10% interest in the corporation; DiVito and Pranno each received a 45% interest. (I App. 130-32). Thereafter the corporation was awarded the sewer and water main construction contract for approximately $150,000. Carlson was to install the sewers, the sewer mains, the water mains and a lift station. It was to paid in three draws for work installed in place every 30 days upon the inspection and approval of the engineer in charge of the project and Evans. (I App. 132-33; 270).

Also in October, Pranno told DiVito and LaKey to meet with Amabile and Evans. At that meeting DiVito told Amabile that he had talked to Pranno and the two of them had concluded there was not enough in the original contract to pay out the money "off the top." Amabile told DiVito that he had taken the job and that he knew what it consisted of. DiVito said that they had to have more money or they did not want the job. (I App. 262-65). Amabile then instructed Evans to devise a way to obtain more money from the job. Evans and DiVito discussed methods of doing this, the discussion ending with Evans' tearing up the original contract calling for payments of approximately $150,000 and writing a new contract providing for payments of $199,600. (I App. 265-67)

Work began on the project in early October. (I App. 135) Fabricated steel forms and prefabricated sewerage pumping stations, manufactured in Missouri and Iowa, were delivered to the project in Lansing, Illinois. (I App. 103, 234, 236, 238, 241) No shipments of materials were

delayed. Because of an urgency, shipments in one case were made quite rapidly from Granco Steel Company, St. Louis, Missouri: "These shipments had been expedited rather than delayed." (I App. 108) Iron pipe shipped to the construction site was installed as soon as it arrived. (I App. 288) A lift station, shipped from Kansas, was installed three days after receipt. (I App. 288)

Toward the end of October Evans told LaKey that he did not want him talking to certain engineers on the job because he was afraid LaKey would tell them Evans knew Amabile, and, if that got back to Riley, he, Evans, would be in trouble. (I App. 285-86) Some time later Evans told LaKey, in reply to the former's inquiry about the letting of contracts, that the only contracts he let at Lansing were the ones Amabile told him to. (I App. 283-84)

Carlson was to be paid in three draws. (I App. 269) A few days prior to the first draw, Amabile told LaKey to prepare the paper work. Two days later LaKey returned with the papers and told Amabile that the amount of the draw was $57,000. (I App. 289-91). Amabile said that he would contact Evans and straighten it out. LaKey was told to come back the next day. (I App. 295)

When LaKey returned, Amabile told him Evans was in the hospital. On the way to the hospital Amabile said that he was going to give Evans a $5,000 "cut" instead of $7,500. (I App. 297) At the hospital Amabile gave Evans a "wad of bills" with which Evans expressed satisfaction. Then Amabile instructed Evans to go over the papers for the draw with LaKey. Evans did so, crossing off a number of items on the estimate sheet. When LaKey inquired about this, Evans told him he would draw the money Evans told him to draw, and Amabile told him to listen to Evans. Evans then had LaKey obtain a new

estimate from the engineering firm which he, Evans, later approved. LaKey questioned the new figure, $47,517.97, as quite a drop from the original. Evans said those were his instructions from the other men for whom he worked. (I App. 299-302) The draw was made on November 12, 1964.

LaKey received the check for this draw and, from its proceeds, deposited $39,000 in Carlson's account at the Colonial Bank, gave Pranno $8,000 in cash and retained $517 for his wages. (I App. 304-5) Three days later, on Amabile's instructions, he withdrew $20,000 from Carlson's account and gave it to him in cash. (I App. 305-7) When DiVito asked LaKey, a few days later, about paying bills with the proceeds of the draw, LaKey told him not to worry, he was paying them. Then he added that Amabile wanted $10,000 from the draw and he had given it to him. (I App. 144-45)

Shortly after the draw LaKey asked Evans how they were able to charge so much for various materials and installations without anyone's becoming suspicious. Evans answered that he was in Riley's office to take care of these matters and for LaKey to mind his own business. At that point Amabile walked up, and, upon being told by Evans that LaKey was getting too nosey, told LaKey to mind his own business, that Evans worked for him, he had put Evans in that office. (I App. 308-9)

After Carlson had received the first draw Riley told Evans that he had been advised of complaints from supply contractors that Carlson was not paying its bills. Evans replied that he could not understand the problem, he was happy with Carlson, and he would take care of the matter. (II App. 523-25) Shortly thereafter, Riley repeated this complaint to Evans, telling him that the lending institution,

by whom the pay-outs were made, had received complaints from the suppliers. Again, Evans promised to look into the matter. (II App. 527)

In January 1965, LaKey told Evans that Carlson did not have sufficient funds to pay for necessary work and materials. Evans said not to worry, he would talk to Amabile and Amabile will talk to "the man" and they would see that the money was in the bank for him. (I App. 327)

Events precipitating threat of extortion.

In January 1965, Amabile told LaKey to prepare the papers for the second draw. LaKey prepared a request for $60,000 and brought the papers to Amabile. Amabile said he had told LaKey never to draw over $48,000; he did not want that kind of money taken out of the account at that time. He told LaKey to leave the papers with him and he would have Evans straighten the matter out. That night LaKey received a telephone call from Evans saying that Amabile had told him to check with LaKey about the draw. (II App. 343-44) Later, Evans went to LaKey's home and they went over the papers. Evans arrived at a figure of $48,000. He then approved the draw and told LaKey to take it to the comptroller for a pay-out slip. (II App. 344-45)

The comptroller refused to authorize the pay-out. From his office LaKey went to Amabile, relating, in Evans' presence, what had happened. Amabile said they would have to take care of that and instructed Evans and LaKey to see Riley the next day. (II App. 346)

Evans and LaKey went to the office together, although at Evans' request they entered separately. When LaKey told Riley that he was there for the pay-out slip for the

second draw, Riley replied that Carlson's bills had not been paid and he would authorize the pay-out only after they were. LaKey said he could not pay them until he received the draw, explaining that, as the contract had been increased to $200,000, there were not enough funds in the bank to pay all of the draws. When Riley asked Evans to explain why the contract had been increased, Evans said they had raised the price to get the job done because of complications. (II App. 349-50; 530)

The threat.

LaKey returned to Amabile and reported that Riley had refused to authorize the second draw. Amabile told LaKey to meet him the next morning and he would go with him to get the matter "straightened out once and for all." (II App. 351)

Amabile and LaKey went to Riley's office the next morning. Amabile asked Riley why he would not pay LaKey. Riley answered that he could not pay him until LaKey paid his suppliers, that the suppliers had threatened to encumber the project with liens. Amabile replied: "I don't care nothing about that. The man's got his money coming, Bill, I want you to pay his money." At that point, Amabile and Riley went into the far corner of the office where LaKey could not hear the conversation, but could see Amabile moving his arms and doing most of the talking. (II App. 352)

Riley testified to the following version of the meeting:

> "Mr. Shine [Amabile] told me that I had to pay this man, that this man was a friend of theirs; that I was expected to pay them; that if I didn't pay them all sorts of people would get mad.
>
> "I told Joe that it would be foolish for me to make this payment; that they were just pushing this com-

pany to ruination; that it just was absolutely ridiculous to pay this man and that I did not want to pay him. (II App. 533-34)

• • •

"[After we left LaKey] Mr. Shine [Amabile] told me that I had no choice on this matter; that I had to pay this man; that the man wanted him paid.

"I told him that this was silly. I had a big loan pending with Equitable Life and this thing would, it could destroy everything that we were trying to build up. I told him that, in fact I begged him not to have to pay him. He told me that I had to pay him. (II App. 534)

• • •

"He told me the man said I had to pay him and he told me if I didn't pay him there would be all sorts of trouble, and there was no sense in me making this trouble for myself so I better pay him because he was a friend of theirs." (II App. 535)

Amabile then returned to the portion of the office where LaKey was standing, smiled and winked at LaKey, and told him he would receive his money. Then he turned to Riley and said: "Don't forget, Bill, I want you to pay this man. I want you to pay him now. You know what I mean." (II App. 353) After they left, LeKey asked Amabile how he was able to tell "a big man like Riley" what to do and what not to do. Amabile gestured with his fist and replied: I got this son of a bitch right here, • • • He's afraid of me." (II App. 354)

Two days later, LaKey received the $48,512.48 pay-out. (II App. 354-55) He deposited the check in Carlson's account at the Mount Prospect Bank (II App. 356) which Amabile had instructed him to open for the prospective

second draw in October 1964. (I App. 327-29) Later, at Amabile's direction, LaKey withdrew $17,000 in cash which he brought to Amabile's apartment. From the $17,000, Amabile gave LaKey $5,000; LaKey in turn gave Evans $1,000.[7] (II App. 360-61)

Riley authorized this second draw, as he testified, because he was afraid of Amabile; he had been subjected to previous threats of physical harm to himself his family and employees, and with economic harm to his company.[8] (II App. 536, 538, 566)

In response to Petitioner's contention that this evidence did not demonstrate a violation of the Hobbs Act, the majority below held: 1) "Since Congress has used all its 'broad and sweeping' commerce power in enacting the Hobbs Act, the courts have rightly attributed great scope to the statute." 2) "As in [*Hulahan* v. *United States,* 8th Cir. 1954, 214 F.2d 441, *cert. den.,* 348 U.S. 856], Amabile was exacting tribute from a builder 'dependent upon interstate commerce for materials, equipment and supplies' and was therefore within the reach of the Hobbs Act." 3) "As pointed out in our prior opinion [*United States* v. *Battaglia,* 7th Cir. 1968, ... F.2d .....], the $48,500 payment made pursuant to Amabile's threats depleted Riley Management Corporation's reserves. Depletion is pertinent in considering commerce under the Hobbs Act." 4) "The Hobbs Act does not require that the threats to Riley and his family be directly aimed at interstate commerce. * * * There is no requirement that the extortion be directed at interstate commerce as long as the extortion

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[7] At the same time, Amabile instructed LaKey not to tell Pranno or DiVito about the money or the new bank account. (II App. 360)

[8] See Statement Point III, *infra,* pp. 28-29 n. 11.

'in any way or degree obstructs, delays, or affects commerce' * * *'' (App. A, *infra*, pp. App. 2-4)

The dissenting Judge, on the other hand, concluded: 1) ''There was no evidence * * * that there was any delay in the shipment or delivery of [materials obtained from suppliers located without Illinois]. Moreover, there was no evidence that any extortion threat directed against Riley carried with it, express or implied, a threat that the work on the Lansing project would be stopped or hindered.'' 2) ''* * *[A] threat to extort proscribed by the Hobbs Act must have a reasonable causal relation to interstate commerce. The likelihood of an obstruction to the flow of commerce must be the result of the threat. This *essential nexus is missing in the instant case.*'' 3) ''*In the* instant case * * * there was no * * * probability that Amabile's threats to Riley, if not complied with, would have resulted in the interruption of the shipment of construction supplies and materials for the Lansing project. (In fact, it was to Amabile's advantage that the Lansing project proceed without interruption; for only then would Riley have authorized Carlson Construction Company to request 'draws' for funds * * * *)'' 4) ''If a depletion of reserves is all that is necessary to show the requisite affect on commerce, then a threat of any kind to extract money made to a person who happens to operate a business engaged in interstate commerce comes within the statute's proscription. * * * I do not believe that the Hobbs Act was intended to have such a broad reach.'' (App. A, *infra*, App. 13-16)

II. There was no proof that Petitioner conspired to extort money from Riley or the Riley Management Company.

The activities of the co-defendant Dave Evans in those matters leading to the payment of the $48,500 second draw have been detailed in Point I of the Statement, *supra*. After

receiving the $5,000 from Amabile, LaKey, at Amabile's request, went to Florida. Shortly thereafter, Evans called and advised LaKey that Amabile wanted him to return to Chicago. LaKey returned and met with Evans and Amabile. Amabile complained that, by not paying bills, LaKey had gotten him in trouble with Riley, had gotten Riley in trouble, and was "making Dave Evans lose his job." (II App. 361-63) A few days later, LaKey complained to Evans that the bills were unpaid because of Amabile's actions. Evans agreed but advised LaKey to follow orders. LaKey asked Evans why he did not get out of the business and Evans replied that he could not quit as he was in too deep, he knew too much about the other people and he owed Amabile too much money. (II App. 363-64)

Pranno's activities have also been described, although in less detail.

Evidence concerning Rocco Pranno.

Within a week or ten days after work on the Lansing job began, Amabile told DiVito, who had been assisting LaKey at the construction site, to stay off the job and that he would have trouble if he did not stay away. DiVito relayed this to Pranno and then returned to the site. (I App. 140-43) Amabile repeated his warning to DiVito later in October. Again DiVito relayed the matter to Pranno who instructed DiVito to return to the job, telling him he would accompany him there. Pranno did this for a few days. Later, however, Amabile warned DiVito a third time, telling LaKey, in DiVito's and Evans' presence: "I thought I told you to keep Mike DiVito off the job. We don't want him on the job. He is too well known. We don't want Riley people seeing him on the job and he might get Dave Evans in trouble. He will get my man in trouble, Dave Evans, at the Riley office." DiVito did not return to the job site after this. (I App. 143; 279-81)

At about this time, Pranno complained to DiVito that LaKey was not reporting to him on the progress of the job. LaKey joined them a few minutes later and Pranno shouted at him not to frequent Amabile's club, but to frequent Pranno's where he belonged. (I App. 149-50) A similar scene between Pranno and LaKey, with DiVito present, took place in late December. Pranno raised a chair as if to hit LaKey and yelled at him, saying: "What are you always doing by Joe Shine's [Amabile's] place? Are you his partner?" LaKey denied this, and at that time Amabile walked in. Pranno repeated he did not want LaKey going to Amabile's club and then Amabile and Pranno had a private conversation. (I App. 151-54)

After LaKey deposited the proceeds of the second draw in the account at the Mount Prospect Bank, which he had opened in October at Amabile's directions (II App. 356), Amabile instructed him not to tell DiVito or Pranno about the new bank account or the money. This conversation took place immediately prior to the distribution of $17,000 from that draw. (II App. 360-61; see Statement Point I, *supra*, pp. 15-16.)

In mid October 1964, Pranno had given DiVito and LaKey approximately $13,000 to open a bank account for Carlson at the Colonial Trust & Savings Bank. (I App. 135-37; 273-75) Sometime later, but prior to the first draw, DiVito, LaKey and Pranno borrowed an additional $5,000 for operating expenses which LaKey was to deposit in the Carlson account. (I App. 146) This $5,000 was due to be repaid on January 5, 1965. On or about that date, both Pranno and DiVito met with Amabile, complained that they could not find LaKey and asked Amabile to help them get the $5,000 back from LaKey. (I App. 154-55; 158-59) Several days later, they again met with Amabile, and Pranno said that, if Amabile could not help locate LaKey,

he was going to the "Farm to see the 'man.'" Amabile said to go ahead. (I App. 161) As they left, Pranno told DiVito he did not understand why "The Man" took Northlake away from him and gave control of it to Amabile (I App. 161-63) when he was doing so well there. (I App. 166-67)

Evidence concerning Sam Battaglia.

In November or December 1964, prior to the above conversation, Amabile took LaKey to a horse farm owned and operated by Battaglia. LaKey was introduced to Battaglia as the man who was "running the job for them in Lansing, Illinois." (I App. 329-30) As Battaglia and Amabile returned from a private conversation, Battaglia asked why Evans was receiving "that kind" of money. Amabile answered: "I made a deal with the man. The man got us the job. * * * I promised him $7,500, I'll take care of it." (I App. 332-33) While they were driving back, Amabile asked LaKey if he knew who they had just seen and, receiving LaKey's answer that he did not, said it was none of LaKey's business, that he would find out later. (I App. 333-34) LaKey did some work at the farm the following Sunday. When he returned, he asked Amabile why he had not been told that the farm belonged to Battaglia. Amabile told him to forget he had been to the farm. (II App. 337-38) The following day, LaKey told Evans of his trip to the farm. Evans said not to talk about that and not to let Amabile hear him talking about it. (II App. 339-40)

Pranno and DiVito drove out to the "Farm to see 'The Man'" about LaKey in late February or early March 1965. They met Amabile there. After a short wait, Battaglia arrived. In response to an inquiry by Battaglia as to what he could do for them, Pranno said: "You know about this Riley deal in Lansing where we got Hank LaKey

to set up the company and do the work for us and figure $20,000 in for you." Battaglia "nodded." Pranno said: "Joe Shine [Amabile] got us the job and the[illegible] Hank LaKey away from us." Amabile denied this. [illegible]no repeated that he did, and Battaglia told the two "cut it out." Pranno then continued: "You know we had to borrow $5,000 to keep this job in Lansing going and now I can't find LaKey, and you know there was $20,000 in this deal for you." Battaglia nodded and said "Yes." Then Pranno said: "I want to know what Joe Shine is doing to me. I want you to tell Joe Shine to get that $5,000 from LaKey so that we can pay back this loan." Pranno also said LaKey was a "No good s.o.b." Battaglia replied that he did not think LaKey was "such a bad guy," that he liked him and liked to work with him, and that they had other things coming up on which they could use him again because he was "clean." After a pause of a few minutes, Battaglia told Pranno that he would see what he could do for him, and DiVito and Pranno then left. (I App. 171-72)

On their return, Pranno told DiVito he had told Battaglia that there was $20,000 in "the deal" for him because "he thought that Joe Shine was shortchanging 'the man' * * * [by telling him that] there probably maybe was $10,000 in it for the man and keeping the other $10,000 for himself." Pranno went on to say that he did not see how "the man" would let Amabile do this to him. (I App. 174)

The majority ruled[9] there was evidence to show that the extortion was pursuant to a conspiracy of which Evans was a member because: 1) "On this record, it is obvious that Evans knew of Riley's fear of Amabile." 2) "Evans

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[9] *United States* v. *Battaglia, et al.*, 7th Cir. 1968, ... F.2d ....., See App. B, *infra.*

knew that Riley was unwilling to pay the second draw * * *" 3) "The jury could properly infer that Evans knew Amabile would induce Riley—through fear—to authorize the second draw." 4) "Even though he may not have spoken to Amabile about the second draw, Evans' own statement to LaKey showed his willingness to take part in a course of action which would show payment by coercion." 5) "It would be unreasonable to suppose that Evans would be so closely associated with Amabile in the scheme to defraud without realizing that Amabile would employ coercive means for obtaining the second draw." 6) "* * * Evans is chargeable with his co-conspirator's acts in furtherance of the conspiracy." (App. B, *infra*, pp. App. 30-31)

Judge Swygert concluded: "The evidence with regard to Evans shows that the only agreement or 'common design and undertaking' to which he was a party was one to bilk the Riley company by means of fraud and deceit out of money earmarked for the Lansing job." (App. B, *infra*, p. App. 55)

As to Battaglia, the majority found that from the evidence of Battaglia's statement during the February or March 1965 meeting (subsequent to the second draw), to the effect that he liked LaKey and they could use him in other matters because he was clean, "* * * the jury could infer that Battaglia had embarked 'on a criminal venture of indefinite outline' * * ** He was committed to a long-term relationship contemplating the use of LaKey in numerous ventures. * * * Since Battaglia [admitted he] had a stake in the outcome of the conspiracy, even the stringent test of conspiracy liability evolved * * * in *United States* v. *Falcone*, 109 F.2d 579, 581 (2nd Cir. 1940), affirmed, 311 U.S. 205, was satisfied. * * * Being an associate of Amabile in this venture Battaglia is properly chargeable with knowledge that his confederate, Amabile, would resort to threats

if necessary to extract money from Riley. Battaglia had to 'take his chances' as to the methods used by the other co-conspirators. * * * Evidence of knowledge of the details of the plan or of participation of others is not required." (App. B, *infra,* p. App. 32)

Contrariwise, Judge Swygert felt: "The slender reed on which the Government depends to demonstrate an agreement to extort between Amabile and Evans is not even present with respect to Battaglia." He concluded: "On this record there is absent any evidence, direct or circumstantial, demonstrating that Battaglia knew that money was to be extorted from Riley or that threats were to be made to Riley by Amabile." (App. B, *infra,* pp. App. 58, 59)

In Petitioner's appeal, the majority rejected his contention that the evidence failed to establish a conspiracy with a reference to its prior decision in *Battaglia.* (App. A, *infra,* p. App. 2) Judge Swygert repeated his view that "* * * there was insufficient evidence of a conspiracy engaged in by Amabile with Battaglia and Evans 'to obstruct, delay and affect commerce'* * * by means of extortion." (App. A, *infra,* p. App. 13)

III. Refusal to permit Petitioner to inquire on cross examination a) into facts showing motive of William Riley for testifying and the consideration he received therefor, and b) regarding his failure to mention previous threats of physical violence by Petitioner and another in prior statements given to Government Agents, deprived Petitioner of the right of cross examination guaranteed by the Sixth Amendment.

A. During cross examination of William Riley, counsel for Petitioner attempted to show that Riley was under in-

dictment in the Circuit Court of Cook County, Illinois, for theft,[10] that he was under investigation by the Internal Revenue Service for suspected income tax evasion, and that his testimony in this case was given in the hope and expectation of securing favorable consideration in both those matters from the law enforcement officers involved. The following took place (II App. 615-18):

* * *

Q. Are you the same William G. Riley who was indicted by the Criminal Court of Cook County for thievery in 1966 in the month of February.

Mr. Lamendella: I will object to that, your Honor,

The Court: I will sustain the objection. Mr. Bellows, you know better than that.

Mr. Bellows: I will connect it up, your Honor.

The Court: Mr. Bellows, you know better than that and I direct the jury to disregard that question.

* * *

Mr. Bellows: May I have a side-bar conference, your Honor, with reference to this?

The Court: No, no side-bar conference after those questions, sir.

Mr. Bellows: May I be permitted to make an offer of proof outside of the presence of the jury?

The Court: In respect to that last question, you may.

* * *

Mr. Bellows: Your Honor, my offer of proof is as follows: I expect to show by cross examination and

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[10] Illinois Revised Statutes, 1967, Ch. 38, §16-1, incorporates all offenses involving the taking of the property of another, by whatever means may have been recognized previously (except "robbery" and "false pretenses"), into one statutory offense, "Theft."

it may be verified, if you choose to do so, if he denies the fact, that he was indicted in the month of February, 1966, for the crime of theft which is a felony; that the matter has been pending now over a year and that the reason for the extraordinary delay in bringing this matter to justice for a crime of theft—actually it was forgery, but under our new statute, your Honor, it is considered to be theft—is that he expects to get consideration, your Honor, from the court and the prosecution in Cook County for his cooperation with the government in this case and for his testimony in this case.

For that reason, your Honor, I think it is extremely important to show motive and reason for his testimony in this case.

The Court: What is the government's position in respect to the offer of proof of the defendant Amabile?

* * *

Mr. Lamendella: If this offer is being made, your Honor, to impeach the witness on the basis of an indictment, we object.

The Court: Do you object to the offer?

Mr. Lamendella: Yes, we do.

The Court: I sustain the objection.

Bring in the jury.

Mr. Bellows: May I add one more point, your Honor?

The Court: I have ruled on your offer. You can't add to an offer once it is made, sir.

Mr. Bellows: I want to explain the position of Lamendella to be inconsistent with my offer. He says he objects to the indictment. This is beyond the indictment.

The Court: He said he objected to the offer.

Mr. Bellows: Well, he said to the indictment.

The Court: You object to the offer of proof?

Mr. Lamendella. I do your Honor.

* * *

[By Mr. Bellows]

Q. Mr. Riley, are you presently under investigation by the Internal Revenue for evasion of taxes?

Mr. Lamendella: I will object to that, your Honor.

The Court: I sustain the objection.

Mr. Bellows: May I make another offer of proof?

The Court: Yes.

* * *

Mr. Bellows: My offer of proof, your Honor, is that Mr. Riley, the witness on the stand, is presently under investigation by the Internal Revenue; that he has two lawyers prominent in the tax field in criminal cases representing him, and that if he were cross examined, your Honor, he would admit, I am sure, that he knows that his financial affairs are under investigation by the Internal Revenue for failure to account for taxes and for the evasion of taxes, and that his books are in the hands of the Internal Revenue agents, and that he expects to get consideration, your Honor, from the government for his cooperation with them in this case and for his testimony in this case.

The Court: What is the position of the government in respect to the offer of proof of the defendant Amabile?

Mr. Lamendella: We object, your Honor.

The Court: I sustain the objection.

* * *

The majority held: 1) "Viewed in isolation, Amabile's efforts to explore Riley's motives for testifying in the Government's favor might be proper." 2) "* * * [A] defendant may normally show that a prosecution witness expects favorable treatment from the Government in return for his testimony." 3) "* * * [A] witness may not be impeached by showing that he has been arrested and indicted." 4) "In the present case, the District Judge was faced with a collision of these two principles. He was entitled to balance the conflicting interests * * * *" 5) Examination of Petitioner's entire cross-examination of Riley leads to the conclusion "that Amabile's references to the state indictment and federal tax investigation were designed to prejudice the jury against Riley through smear and innuendo rather than to impugn his veracity." And, alternatively, 6) "* * * that appellant's 'questions do not appear sufficiently likely to have developed evidence that would have significantly weakened the Government's case' by showing the witness' bias * * * [because] The United States Attorney does not control investigations being conducted by the Internal Revenue Service * * * [and] As to the state court criminal action, the United States Attorney was of course not empowered to accord any consideration." (App. A, *infra*, pp. App. 6-9)

Judge Swygert considered this restriction of cross-examination "an error which alone would require reversal * * * *" He did "not believe that a conflict between * * * evidentiary rules, such as the one the majority attempts to erect, exists." And, he concluded: "It is apparent from the record that the district judge perceived no 'collision' of the kind suggested by the majority. Moreover, any attempt to show the bias of a witness by evidence that he is under indictment or investigation would create the same 'collision.' Thus the rule enunciated by the majority might

preclude cross examination of this kind in every case, a result contrary to the general rule permitting such inquiry." (App. A, *infra,* pp. App. 16, 19, 21)

B. The Government's claim that the $48,500 second draw was obtained by extortion rested upon Riley's assertion that he was afraid of Amabile because of threats which Amabile and Palermo had previously made concerning his personal safety and that of his family.[11] On cross examination, the defense attempted to show that Riley had not mentioned certain specific threats to which he had testified

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[11] Including the threat described at page 7, *supra,* Riley told of four alleged threats by Amabile (or Amabile and Palermo) prior to January 1965. The first of these took place in April 1962, at Palermo's office. Palermo asked Riley about a proposed project in Northlake, Illinois, and Amabile told Riley he was "the man" in Northlake, Riley was not going to make a move there without his permission, and that would cost $70,000. At one of a number of subsequent meetings, when Riley said he did not have the $70,000, Palermo said he had the ability to stop one of Riley's projects in Addison, Illinois, and Amabile added there were ways people like Riley could be stopped. Subsequently, Riley paid Amabile $30,000. (II App. 540-41; 555; 557)

In June 1963, Amabile allegedly told Riley that he wanted the concession to install washers and dryers in Riley-built apartment buildings in Northlake. When Riley said he had given the concession to someone else, Amabile said "the man" wanted the business and he did not care what was done, "the man" had to have the business (II App. 559)

In September 1963, at a meeting with Palermo, Amabile allegedly told Riley to give Palermo the plumbing contract on a project in Westmont, Illinois, and in any other work they asked for; he added that otherwise he could put village officials in Northlake to work to stop construction there immediately. Riley objected to Palermo's work. Amabile then told Riley he was "nothing but a wise guy and he would handle [him] with a baseball bat if [he] didn't stop trying to be a wise guy." Riley asked to leave and Amabile said he could not. Palermo said he would "bury" Riley's construction superintendent and Amabile said he would hammer the nails in the coffin.

—that Amabile said he knew where Riley's mother lived (II App. 507-7, 565), that he said he knew where Riley's children went to school (II App. 506-7, 565), that he threatened to use a baseball bat on Riley (II App. 506-7, 564), and that Riley would need a cane from then on if Palermo did not receive certain plumbing contracts (II App. 506)—in statements which he had given Government Agents prior to trial. (III App. 683-85) Riley, in answer to an invitation to point out where, in one of his statements, he had told about these threats, answered that the disclosure was recorded on the second page of his October 5, 1965 statement, the first statement he had given. (III App. 684-85) Counsel for Petitioner was then refused in four attempts to find out exactly where, on the second page, this disclosure was to be found. (III App. 684-85) Finally, he attempted and formally offered to show that Riley failed to mention these specific threats in all five of his pre-trial statements, including the one made on October 5th. The court refused to allow questions concerning this to be asked. (III App. 685-87)

Amabile said he knew where Riley's mother lived and where his children went to school, and that Riley would need a "candy cane from then on out" if they did not receive the work. (II App. 563-65)

Evidence of these pre-conspiracy threats were received, ostensibly, to show the reasonableness of Riley's fear of Amabile in January 1965. Finding such relevance and that the "District Court carefully instructed the jury that this testimony was limited to that purpose (Tr. 2564)," the majority held Battaglia's assigned error (adopted by Petitioner) concerning the admission of this evidence without merit. (App. B, *infra* p. App. 37) Judge Swygert was "at a loss to find the 'careful instruction' referred to by the majority" and was of the opinion that the evidence of threats by Palermo, not even charged as an unindicted co-conspirator, was irrelevant for any purpose. (App. B, *infra,* p. App. 64) In Petitioner's appeal, he concluded that the admission of this evidence prejudiced Petitioner. (App. A, *infra,* p. App. 21)

IV. Refusal to order production of the Grand Jury minutes of the testimony of Government witnesses Riley, LaKey and DiVito and the subsequent adoption of a prospective rule regarding the production of such minutes by the Court of Appeals deprived Petitioner of fundamental rights.

Following the direct testimony of the witness Mike DiVito and after it had been ascertained that he had also testified before the Grand Jury, counsel moved for the production of the transcribed minutes of that testimony. (I App. 194-95) The trial judge inquired if the Government were willing to deliver up the minutes. The Assistant United States Attorney answered: "No, your Honor. We would gladly give the Court the copy for an in camera inspection." The court, ignoring this offer, immediately asked counsel "What authority you have * * * that would make it legal for me to compel the government to turn over a transcript of this witness' testimony before the grand jury?" (I App. 195) Counsel promised to return following the noon recess with authority.

During the afternoon session the following took place (I App. 233-34):

* * *

> The Court: All right.
>
> Now, Mr. Bellows, I sustained an objection to your motion that the government be required to produce for the examination of the defense lawyers the transcript of the testimony of this witness before the grand jury, and I am going to adhere to that ruling. I will save you all of the research that you were going to do during the luncheon recess. I call your attention to Rule 16 as amended of the Criminal Rules and it does provide, Mr. Bellows, that the recorded testimony of a defendant before a grand jury may be produced by

way of discovery and inspection. Moreover, in my opinion a transcript of a witness' testimony before a grand jury is not a statement within the meaning of Subsection (e) of Section 3500.

Mr. Walsh: Your Honor, may I join in Mr. Bellows' motion for the production of the grand jury minutes on behalf of Mr. Battaglia and I would urge as authority Dennis v. United States at the last term of the Supreme Court.

The Court: I will stand on my ruling. You may join and I deny your motion.

Mr. Bellows: Your Honor, may I ask that the grand jury testimony be sealed and impounded, your Honor, for whatever purposes we may need it?

The Court: I haven't any authority to do that. You may ask.

Mr. Bellows: I am asking.

The Court: And I deny your request.

Mr. Walsh: Can it be marked as an exhibit?

The Court: No, because I rule it is not properly here, if it were here, or if it is here.

* * *

Subsequently, following the testimony of LaKey (II App. 389-90) and Riley (III App. 688-89) the defense moved for the production of the grand jury minutes pertaining to each. The motions were denied.

Later events[12] disclosed that the minutes of Riley's testi-

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[12] During a subsequent trial of Amabile, Palermo and others, in which Riley again appeared as the principal Government witness, the same trial court, upon the authority of *Dennis* v. *United States*, 384 U.S. 855, ordered production of the grand jury minutes. These minutes—the same as those sought in the instant case—were certified to the Court of Appeals and were appended to Battaglia's petition for rehearing of his appeal. (See, App. A, *infra*, p. App. 10, n. 7)

mony before the Grand Jury, like his 3500 statements, did not contain references to the alleged threats of physical violence by Amabile and Palermo.

The majority held that Petitioner "did not show particularized need [for the minutes at the time of the request] and cannot now supply that requirement by hindsight." Further, the majority said: The offer by "the Assistant United States Attorney * * * to give a copy to the Court for an *in camera* inspection * * * was not accepted by defense counsel. If it had been accepted, the statements might have been turned over to them, so that any error in this connection was of defendant's own making." Finally, the Court ruled: "In *United States* v. *Youngblood*, 379 F.2d 365, 370 (2d Cir. 1967), the Court of Appeals for the Second Circuit promulgated a prospective rule giving the defense access as of right to a witness' grand jury testimony on the subjects about which he testified at the trial, unless the Government can show that access should be denied. At the oral argument of this appeal, the Government stated that it had no objection to such a prospective rule in this Circuit. We approve of the *Youngblood* procedure and adopt it with respect to trials commencing after this judgment is entered." (App. A, *infra*, pp. App. 11-12)

REASONS FOR GRANTING THE WRIT

1. A threat of extortion must have a reasonable causal relation to interstate commerce in order to violate the Hobbs Act.

When this Court last reviewed a Hobbs Act prosecution, it declared that the Act "speaks in broad language, manifesting a purpose to use all the constitutional power Congress has to punish interference with interstate commerce by extortion, robbery or physical violence." *Stirone* v. *United States*, 361 U.S. 212, 215. Nevertheless the Court cautioned, "The charge that interstate commerce is affected is critical since the Federal Government's jurisdiction of this crime rests only on that interference." (361 U.S. at 218) The present case tests the limits of the Hobbs Act and the manner in which commerce must be affected to meet that jurisdictional test and the intent of the statute. Practically speaking, the question here is whether every extortionate threat made to a person who operates a business engaged to any extent in interstate commerce comes within the ambit of the statute, or whether there must be a nexus between the threat itself and interstate commerce.[1]

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[1] Judge Swygert, dissenting, felt "that a threat to extort proscribed by the Hobbs Act must have a reasonable causal relation to interstate commerce. The likelihood of an obstruction to the flow of commerce must be the result of the threat." (App. A, *infra*, p. App. 14) Consequently, he viewed the majority's decision that "a depletion of reserves is all that is necessary to show the requisite affect on commerce," as having the potential of affording "a retail store owner, for example, * * * federal protection from extortion, regardless of the nature or the likely

In the most recent Seventh Circuit decision involving the Hobbs Act preceding this case, *United States* v. *Pranno*, 7th Cir. 1967, 385 F.2d 387, *cert. den.*, 88 S.Ct. 1028, the Court said (385 F.2d at 389):

> "Extortion by threat to disrupt a local activity the stoppage of which would in turn result in stoppage of interstate shipment of raw materials essential for that activity falls within the act. The statute seems to be read as not only prohibiting the obstruction of commerce by extortion, but also prohibiting extortion by any threat, the carrying out of which would obstruct commerce."

With that statement there is no dispute. But the carrying out of the threat in the present case would not have obstructed commerce; Riley might have been injured physically, but the business of Riley Management would have

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affect of the threat, simply because his stock of merchandise had in some measure moved in interstate commerce." He did not "believe that the Hobbs Act was intended to have such a broad reach." (App. A, *infra*, pp. App. 15-16) While this is precisely the point Petitioner attempted to make below, and the outlook which prompts the question here, the example posed by Judge Swygert does not go far enough. Under the rationale employed by the majority — *viz.* depletion of assets having an effect on purchasing power—extortion of anyone who purchases any of the million and one necessities of daily living which originate from without the state would be in violation of the act because a subsequent reaction to the threat—the payment of money—would deplete the victim's assets and reduce his purchasing power. And then too, because the Act also proscribes affecting commerce by robbery, the decision may be taken as opening the way for federal prosecution of the "hold-up" man merely because by his robbery he has reduced the purchasing power of his victim. This reasoning may reduce the problem to it most absurd terms, but on the other hand the decision of the majority does open wide this possibility of greatly expanded federal prosecution of essentially local crimes.

continued. There was no nexus between the threat and commerce.

As a consequence, because it undoubtedly realized this at trial, the Government urged that "the resources of the Riley Management Corporation were depleted by extortion * * * [and since] the business of the Riley Management Corporation depended on shipments of materials and supplies in commerce, * * * [it could be] infer[red] that the extortion in some way or degree did obstruct, delay or affect commerce." The trial judge accepted this view and instructed the jury accordingly. (III App. 972-73) On appeal, the Seventh Circuit abandoned the limit set by *Pranno,* accepted the Government's view, and found authority for so doing in *United States* v. *Provenzano,* 3rd Cir. 1964, 334 F.2d 678, *cert. den.,* 379 U.S. 947, in which the Third Circuit approved an instruction that the depletion or diminution of the resources of a business by "payments of money obtained by extortion [was likely to impair] the capacity to efficiently conduct such business * * * to the extent of the drain on its resources * * * *" (334 F.2d at 692)

Provenzano, like every other Hobbs Act case,[2] however,

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[2] See e.g., *Nick* v. *United States,* 8th Cir. 1941, 122 F.2d 660 (implied threat to disrupt victims' businesses by causing work stoppages if demands not met); *Hulahan* v. *United States,* 8th Cir. 1954, 214 F.2d 441 (freedom from labor problems guaranteed in return for payments, but intimation that same would not be true if demands not met); *United States* v. *Varlack,* 2nd Cir. 1955, 225 F.2d 665 (express threat to disrupt business if demands for payment of money not met). Compare, *Stirone* v. *United States,* 361 U.S. 212, 215 (charged threat to interfere with shipment of sand to victim, if demands for payment of money not met, within scope of the Act; whether "obstruction" of prospective steel shipments from steel mills being constructed with concrete supplied by victim "would be enough, alone, to bring this transaction under the Act is a more difficult question," not decided because of other error.)

concerned a threat to delay, obstruct or affect the victim's interstate (trucking) business by labor slow downs and similar disruptive acts if the extortionate demands were not met. (334 F.2d at 681-82, 687) But again, this was not so in the present case. As even the majority recognized (See, App. A, *infra*, pp. App. 3-4), Petitioner did not threaten to disrupt Riley's business. Moreover, insofar as that business was a principal source of income for him,[3] it was contrary to Petitioner's interests to disrupt the business. There was no connection between the threat and interstate commerce. It was only Riley's response to the threat, his payment of money, which can be said to have had an affect on commerce, and that by reason of the fact that the payment depleted his assets. Such a tenuous relation is indistinguishable from the affect on commerce generated by the robbery of the corner drug store which also purchases its wares in interstate commerce.

One other Circuit has considered an aspect of this issue. In *United States* v. *Critchley*, 3rd Cir. 1965, 353 F.2d 358, an union business agent was charged with obstructing, etc., interstate commerce by extorting from the Associated Roofing Contractors of New Jersey a payment of $4,000, "induced by the wrongful use of economic and financial injury to the businesses of the members" of that organization and by threatened labor disputes, work stoppages and other

[3] Under its contract with Riley Management, Carlson was entitled to a third draw upon completion of its work. (I App. 270). Consequently, there was evidence that, even after the second draw Amabile attempted to maintain Evans' status with Riley Management in order to insure continued performance of the contract. Thus, he recalled LaKey from Florida and complained to him that his failure to pay Carlson's bills had gotten Amabile in trouble with Riley, had gotten Riley in trouble, and was jeopardizing Evans' position with Riley. (II App. 361-63)

interruptions in connection with their business operations. (353 F.2d at 360-61) The Government failed to prove that the defendant had threatened labor disputes, work stoppages and other interruptions. It did prove that the defendant had solicited a bribe, first not to make, and then to withdraw, a complaint against one of the representatives of the association concerning his failure to meet certain contract specifications in connection with the construction of public housing. The defendant also threatened that "'if he did not get the money then one by one, dead, he would ruin the roofers.'' (353 F.2d at 359) The Third Circuit examined the element considered important here—depletion of assets. It observed that this Court has held "there are two essential elements of a Hobbs Act crime; interference with commerce, and extortion'' (*Stirone* v. *United States*, 361 U.S. 212, 218), and concluded that "Assuming that the defendant's solicitation and extraction of the $4,000 payment was extortion and not merely a 'bribe' there is here absent proof of the element of 'interference with commerce.' '' (353 F.2d at 361) The Court ruled: "The making or the pressing of the complaint * * * would not in any respect have obstructed, delayed or affected commerce or any article in commerce * * * nor would the initiation and pressing of complaints against other members of Associated, have done so.'' (353 F.2d at 361) To the extent then that the Third Circuit views the Hobbs Act as proscribing only threats, "the carrying out of which would obstruct commerce'' (*United States* v. *Pranno*, 7th Cir. 1967, 385 F.2d 387, 389), it may be considered to be in harmony with former decisions of the Seventh Circuit, but in conflict with the latest decision of that Circuit as expressed in the present case.

It is important that the Court review this case to determine the limits of the Hobbs Act and resolve the apparent

conflict between the Third and the Seventh Circuits as to what those limits are. In this era, the decision of the Seventh Circuit in the present case fairly well emasculates the critical difference between the essentially local offenses of extortion and robbery and the peculiarly federal offense described by the Hobbs Act, interference with interstate commerce. See, *Stirone* v. *United States*, 361 F.2d 212, 218; *United States* v. *Stirone*, 3rd Cir. 1958, 262 F.2d 571, 578, 579 (dissenting opinion). Review of this case is necessary to re-establish that critical difference.

II. There was no proof that Petitioner conspired to extort money from Riley or the Riley Management Company.

The decision below rests upon two related propositions which together, or separately, represent an attempt to enlarge the permissible scope of conspiracy prosecutions. It is necessary to review these propositions by which the majority was able to conclude that both Evans and Battaglia[1] conspired with Petitioner to commit the peculiarly federal offense of obstructing interstate commerce by a threat of extortion in order to carry out this Court's warn-

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[1] Neither majority nor dissent voiced an opinion as to whether Pranno was a party to the charged conspiracy. Judge Swygert assumed he was not. (See, App. A, *infra*, p. App. 13) In view of the abundance of evidence of the friction and "back-biting" between Petitioner and Pranno, both before and after the threat (see Statement, *supra*, pp. 18-21), the evidence that the two were antagonists rather than partners, even in the scheme to defraud as it eventually turned out (see Statement, *supra*, p. 19), and the lack of any evidence that Pranno knew, or had cause to know, of the threat to Riley, this assumption was well founded. If then Evans and Battaglia were not parties to the charged conspiracy, Petitioner could not be convicted of conspiracy. *Hartzel* v. *United States*, 322 U.S. 680.

ing that it would "view with disfavor attempts to broaden the already pervasive and widesweeping nets of conspiracy prosecutions." *Grunewald* v. *United States*, 353 U.S. 391, 404.[2]

The evidence showed that Petitioner, Evans, Pranno, DiVito and LaKey originally entered into an agreement to obtain money from the Riley Management Company by fraud and deceit. So much has been conceded by both the majority and dissent below. (App. B, *infra*, pp. App. 30-32; 55, 57, 62) We may assume *arguendo* that, by his conduct in February (or March) 1965, Battaglia was part of this agreement. At this point, however, the opinions diverge, and this divergence is representative of a doctrinal difference concerning the scope of conspiracy prosecutions which should be resolved by this Court.

The majority concludes that "On this record, it is obvious that Evans knew of Riley's fear of Amabile * * * [and it] would be unreasonable to suppose that Evans would be so closely associated with Amabile *in the scheme to defraud* without realizing that Amabile would * * *" employ coercive means. (App. A, *infra*, pp. App. 30-31; emphasis added.) But this proposition, as stated, is in conflict with the admonitions by the Court against basing guilt on evidence of association (*Krulewitch* v. *United States*, 336 U.S. 440, 454, concurring opinion)[3] or ar-

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[2] See also *Krulewitch* v. *United States*, 336 U.S. 440; *Lutwak* v. *United States*, 344 U.S. 604; *Delli Paoli* v. *United States*, 352 U.S. 232; *Bollenbach* v. *United States*, 326 U.S. 607; *United States* v. *Bufalino*, 2nd Cir. 1960, 285 F.2d 408.

[3] See also, *United States* v. *Falcone*, 2nd Cir. 1940, 109 F.2d 579, aff'd, 311 U.S. 205; *Carbo* v. *United States*, 9th Cir. 1963, 314 F.2d 718; *United States* v. *Borelli*, 2nd Cir. 1964, 336 F.2d 376.

riving at judgments of guilt by piling inference upon inference. *Ingram* v. *United States*, 360 U.S. 672.[4] Evans did not know of the threats. His only participation was in a scheme to defraud, the antithesis of extortion. There was evidence, moreover, that Amabile's role was to be kept secret from Riley (see Statement, *supra*, pp. 11-13), so that Evans could hardly expect or foresee the direct confrontation of Riley by Amabile that is indicative of extortion.

As to Battaglia, the majority finds that he "had 'embarked on a criminal venture of indefinite outline' and therefore, had to 'take his chances' as to the methods used by the other co-conspirators." (App. B, *infra*, p. App. 32) This broad proposition is in conflict with decisions of the Second Circuit that joint venturers take their chances as to the methods used by their associates only if those methods fall within the common purposes of the venture as all understand it. See, *United States* v. *Andolschek*, 2nd Cir. 1944, 142 F.2d 503, 507. *United States* v. *Peoni*, 2nd Cir. 1938, 100 F.2d 401, 403; *United States* v. *Crimmins*, 2nd Cir. 1941, 123 F.2d 271, 273. In *Crimmins*, Judge Hand highlighted the extent of the controversy here when he pointed out that "It is never permissible to enlarge the scope of the conspiracy itself by proving that some of the conspirators, unknown to the rest, have done what was beyond the reasonable intendment of the common understanding." (123 F.2d at 273) And in this context he was only repeating what he had said in *Peoni*: "At times it seemed to be supposed that, once some kind of criminal concert is established, all parties are liable for everything

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[4] See also, *United States* v. *Ross*, 92 U.S. 281; *Pereira* v. *United States*, 347 U.S. 1, 15-16 (dissenting opinion). Compare, *Bollenbach* v. *United States*, 326 U.S. 607; *Tot* v. *United States*, 319 U.S. 463, 467-68.

anyone of the original participants does, and even for what those do who join later. Nothing could be more untrue. Nobody is liable in conspiracy except for the fair import of the concerted purpose or agreement as he understands it; * * *'' (100 F.2d at 403).

This ''chance-taking'' proposition is also in conflict with decisions in the Sixth (*United States* v. *Barnes,* 1968, 383 F.2d 287) and Ninth (*Twitchell* v. *United States,* 1963, 313 F.2d 425) Circuits. Both Circuits have rejected the sprawling doctrine that partners in one criminal venture are criminally responsible for other criminal conduct of a copartner ''even though such criminal conduct was not shown to be necessary or usual to the partnership or known to the copartners.'' *United States* v. *Barnes,* 6th Cir. 1968, 383 F. 2d 287, 292. *Barnes* explains: ''We are not dealing with a civil rule which holds generally that all partners are bound by the acts of any copartners done within the apparent scope of authority to serve partnership purposes. It might aid the financial success of an illegal * * * enterprise for a managing partner * * * [to commit some other crime]; but we do not believe that all copartners could be prosecuted for such crimes if they had no knowledge of them, and had not conspired to bring them about, even though their commission may have served, but was no part of, the objectives of or the motivation for the admittedly illegal partnership enterprise.'' (383 F.2d at 292)

These limits imposed by the Second, Sixth and Ninth Circuits serve to curtail any tendencies to ''broaden the already pervasive wide-sweeping nets of conspiracy prosecutions.'' The decision in this case does not recognize any limits; it encourages pervasiveness. The Court should grant its writ to resolve this fundamental difference and to consider this important question concerning limits on the scope of conspiracy prosecutions.

III. Refusal to permit Petitioner to inquire on cross examination a) into facts showing motive of William Riley for testifying and the consideration he received therefore, and b) regarding his failure to mention previous threats of physical violence by Petitioner and another in prior statements given to Government Agents, deprived Petitioner of the right of cross examination guaranteed by the Sixth Amendment.

In *Pointer* v. *Texas,* 380 U.S. 400, this Court affirmed that the right of cross examination was firmly imbedded in the Sixth Amendment. See also, *Alford* v. *United States,* 282 U.S. 687; *Smith* v. *Illinois,* 390 U.S. 129; *Heard* v. *United States,* 8th Cir. 1919, 255 Fed. 829. Compare, *Jencks* v. *United States,* 353 U.S.657; *Gordon* v. *United States,* 344 U.S. 414. Although recognizing this right in the abstract, the Seventh Circuit has announced new principles in the present case which promise to severely curtail this "essential and fundamental requirement for the kind of fair trial which is this country's constitutional goal." *Pointer* v. *Texas,* 380 U.S. 400, 405. Examination of these new principles ought to be undertaken to resolve the conflicts they entail and to settle questions of paramount importance that cannot help but occur in a vast number of criminal trials.

A. Recognizing that Petitioner had a right to explore Riley's motives for testifying in the Government's favor,[1] the majority, nevertheless, employed a variety of arguments for denying Petitioner that right in the present

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[1] *United States* v. *Masino,* 2nd Cir. 1960, 275 F.2d 129; *Wheeler* v. *United States,* 1st Cir. 1965, 351 F.2d 946; *Harris* v. *United States,* 9th Cir. 1967, 371 F.2d 365; see also, McCormick, *Handbook of the Law of Evidence,* § 40, pp. 82-4 (1954 ed.). Compare, *Napue* v. *Illinois,* 360 U.S. 264, 269.

case. Thus it found in the established rule that a witness may not be impeached by a showing that he has been arrested and indicted, a basis for deciding that the right of cross examination and the rule represent "conflicting interests" which the trial judge was entitled to balance.[2] (App. A, *infra*, p. App. 6) Judge Swygert's dissent, however, points out the novelty of this theory of "conflicting interests" and suggests that it may be employed to defeat entirely the heretofore acknowledged right of a defendant to show that a witness against him expects to obtain leniency for his own problems in return for his testimony. (App. A, *infra*, pp. App. 19-21) So significant has this right been considered before, that a false answer con-

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[2] In arriving at this decision, the majority attempted to divine counsel's motives in asking Riley whether he was under indictment for theft in the state courts and whether he was under investigation by the Internal Revenue Service for income tax evasion. To do this it looked at Riley's subsequent cross examination, culled seven questions "so obviously improper that there has been no attempt on appeal to justify them" (App. A, *infra*, p. App. 7) from the record of counsel's 173 page cross examination (II App. 615-56; III App. 657-90), and concluded that the purpose of the restricted cross examination was "designed to prejudice the jury against Riley through smear and innuendo rather than to impugn his veracity" (App. A, *infra*, p. App. 8), despite counsel's explicit offer of proof to the contrary (See, Statement, *supra*, pp. 24-26), and the failure of the trial judge to so find. Moreover, the fact that evidence may have an undesirable incidental secondary effect has never been regarded as a firm basis for its rejection (see, *Fairbanks* v. *United States*, D.C. Cir. 1955, 226 F.2d 251, 253), especially in view of the availability of cautionary instructions to the jury. Yet even this is overshadowed by the fact that, taken in context, many of the so-called improper questions were designed to show either the association between Riley and Amabile or that Riley Management was not made unpecunious by the payment of the second draw, but rather by Riley's own mismanagement.

cerning the witness' expected reward is cause enough to reverse the judgment. *Napue* v. *Illinois,* 360 U.S. 264.

A second argument used to defeat Petitioner's right to show Riley's motive for testifying was based on the view that the United States Attorney's Office is powerless to influence state criminal prosecutions and the investigations of the internal revenue service. (App. A, *infra,* pp. App. 8-9) Not only does this argument avoid practicality, but it conflicts with the decision of the Second Circuit in *United States* v. *Masino,* 2nd Cir. 1960, 275 F.2d 129, where the United States Attorney actually had interceded with the local authorities. If this argument is given acceptance, then all such "intercessions" will occur after the witness testifies rather than before, a state of affairs which would satisfy a sort of rubric, but which would do little to diminish the fact that consideration was still being promised in return for testimony. Compare, *Gordon* v. *United States,* 344 U.S. 414 (leniency not extended before testimony, but witness warned not to expect it unless he cooperated with government in prosecution of defendant).

B. To prove that Riley was not telling the truth when he testified that he had told investigating agents in his pre-trial statements about specific physical threats made by Amabile and Palermo in 1962 and 1963 and that proof of such disclosure was contained in his October 5, 1965, statement, the opinion below says, in effect, Petitioner should have introduced the statements and called the agents as his witnesses. (App. A, *infra,* p. App. 5; App. B, *infra,* pp. App. 40-41) This alone is not unusual. Certainly, had Petitioner wanted to call witnesses and introduce documents he would have had that right. Compare, *Gordon* v. *United States,* 344 U.S. 414, 420-21. But Petitioner could not be compelled to call witnesses or introduce documents, nor should he have been deprived of the right

to require Riley, on cross examination, to answer whether the matters to which he had testified could be found in any one of his five pre-trial statements, and to further require him, upon receiving an answer that it did appear in one, to identify the portion thereof that he felt contained the questioned material. Petitioner offered to prove by cross examination that the material was not in any statement. The right of cross examination is not exchangeable for the opportunity to call witnesses and introduce documents.[3] Prior decisions of this Court and others have recognized that to bring out facts tending to discredit the witness by showing that his testimony in

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[3] In arriving at the conclusion that it was, the decision below has misinterpreted the record and misapprehended several factors. First, the opinion states that Riley had not read the statements. (App. A, *infra*, p. App. 5) He had; he was given them to read during his grand jury appearance. (III App. 704) Second, the opinion states that Riley had no way of knowing whether the FBI had transcribed his complaints of physical threats. (App. A, *infra*, p. App. 5) He had. Not only had he read the statements, but he was given them during the cross examination and asked to point out where the complaints appeared. He said they were transcribed on the second page of the October 5, 1965, statement. He was then asked to point to the portion of that page which he felt contained reference to specific physical threats. The court would not permit this. (See, Statement, *supra*, p. 29) Third, the reference to *United States* v. *Borelli*, 2nd Cir. 1964, 336 F.2d 376, 391, is inapposite for there the witness had *denied* making certain statements to the FBI. Here, Riley affirmed making the complaints, and said they were in the statement before he was asked where they could be found. Fourth, the opinion states that Petitioner should have called witnesses to impeach Riley's testimony that the material was contained in the statements. But the court would not permit counsel to ask Riley if he had made the complaints in the succeeding four statements and thus Petitioner was unable to lay a foundation for calling impeaching witnesses. See, *Smith* v. *United States*, 6th Cir. 1960, 283 F.2d 16; *Williamson* v. *United States*, 9th Cir. 1962, 310 F.2d 192.

chief was untrue is a right of cross examination. *Alford* v. *United States,* 282 U.S. 687, 692; *Heard* v. *United States,* 8th Cir. 1919, 255 Fed. 829, 832. "The omission from * * * reports [given to government agents] of facts related at the trial * * * are also relevant to the cross-examining process of testing the credibility of a witness' trial testimony." *Jencks* v. *United States,* 353 U.S. 657, 667; see also, *Clancy* v. *United States,* 365 U.S. 312, 316.

Certiorari should be granted to review whether a defendant may be made to substitute the presentation of evidence of his own for effective cross examination of Government witnesses.

IV. Refusal to order production of the Grand Jury minutes of the testimony of Government witnesses Riley, LaKey and DiVito and the subsequent adoption of a prospective rule regarding the production of such minutes by the Court of Appeals deprived Petitioner of fundamental rights.

Two reasons were given by the Court of Appeals for its conclusion that denial of Petitioner's motion for the production of grand jury minutes was not erroneous: 1) Petitioner "did not show particularized need and cannot now supply that requirement by hindsight."; and 2) "* * * any error in this connection was of defendant's own making" by virtue of his not accepting an offer of the Assistant United States Attorney to turn the minutes over to the trial court for an *in camera* inspection. (App. A, *infra,* p. App. 11) Nevertheless, that Court has recognized the force of the arguments in favor of disclosure and adopted a rule, prospectively, granting disclosure as a matter of right.

The assertion that Petitioner "made his own error" is not supported by the record and should not impede this Court's review of the right of defendants to obtain grand jury minutes and the propriety of granting that right but limiting it prospectively. Although Petitioner did not accept the Government's offer to allow the trial judge to examine the minutes *in camera,* he was not extended an opportunity to do so. Immediately after the Government made the offer, the trial court asked counsel for Petitioner the basis of his request. Directing himself to the court's inquiry rather than the Government's offer, counsel promised to provide authority following the noon recess. (I App. 195) At that time, however, without hearing from counsel, the court denied his request. Subsequent citation of *Dennis* v. *United States,* 384 U.S. 855, proved to no avail. Then, when counsel asked that the minutes be impounded and sealed, the court denied that request on the ground that he lacked power to order the Government to disgorge the minutes for any purpose. Attention was never directed to the Government's offer, and the Government did not venture to re-offer the minutes after having secured a ruling that the trial court felt powerless to compel disclosure or delivery. (See, Statement, *supra,* pp. 30-31) Under these circumstances it cannot be said that Petitioner made his own error in connection with this matter. The question of whether delivery should have been ordered under the circumstances and whether a procedure requiring delivery can be limited prospectively must still be considered.

Inferentially, at least, the opinion indicates that Petitioner has made a sufficient *a posteriori* showing of a particularized need. Not only were DiVito, LaKey and Riley the three principal witnesses against Petitioner, but, in the main, their testimony concerned numerous con-

versations with Petitioner or his co-defendants. Much of this testimony was uncorroborated, particularly that of Riley concerning the various threats allegedly made by Amabile and Palermo. "Where the question of guilt or innocence may turn on exactly what was said, the defense is clearly entitled to all relevant aid which is reasonably available to ascertain the precise substance of the statements." *Dennis* v. *United States,* 384 U.S. 855, 872. In this case, moreover, Riley's 3500 statements indicated a glaring discrepency between his pre-trial statements and his testimony relating to various pre-conspiracy threats allegedly made in 1962 and 1963 by Amabile and Palermo. (See, Statement, *supra,* p. 29) Thus, insofar as Riley at least was concerned, the need to use the transcript to impeach him, to refresh his recollection, to test his credibility were all particularized needs. *Dennis* v. *United States,* 384 U.S. 855, 870, citing *United States* v. *Procter & Gamble Co.,* 356 U.S. 677, 683.

But while the Seventh Circuit has rejected Petitioner's claim based upon the denial of the grand jury minutes to him, it has avoided coming into conflict with the other circuits[1] by adopting, prospectively, the procedure promulgated in *United States* v. *Youngblood,* 2nd Cir. 1967, 379 F. 2d 365. Henceforth, the Court held, defendants will be permitted "access as of right to a witness' grand jury testimony on the subjects about which he testified at the trial, unless the Government can show that access should be denied." (App. A, *infra,* p. App. 12.) The procedure employed by the Court does not comport, however, with the

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[1] See, *Schlinsky* v. *United States,* 1st Cir. 1967, 379 F.2d 735; *Cargill* v. *United States,* 10th Cir. 1967, 381 F.2d 849; *Worthy* v. *United States,* D.C. Cir. 1967, 383 F.2d 524.

criteria for such a prospective rule set forth by this Court in *Johnson* v. *New Jersey*, 384 U.S. 719; *Linkletter* v. *Walker*, 381 U.S. 618 and *Tehan* v. *United States ex rel Shott*, 382 U.S. 406.

Disclosure of grand jury minutes affects "the very integrity of the fact-finding process" and averts "the clear danger of convicting the innocent." See, *Johnson* v. *New Jersey*, 384 U.S. at 727-28; *Linkletter* v. *Walker*, 381 U.S. at 639; *Tehan* v. *United States ex rel. Shott*, 382 U.S. at 416. This is clear, of course, because the minutes are used "to impeach a witness, to refresh his recollection [and] to test his credibility," (*Dennis* v. *United States*, 384 U.S. 855, 870, citing, *United States* v. *Procter & Gamble Co.*, 356 U.S. 677, 683) matters which are the very essence of the fact finding process and are universally recognized as the principal method for preventing the conviction of the innocent. See, *Pointer* v. *Texas*, 380 U.S. 400, 404; *Alford* v. *United States*, 282 U.S. 687, 692.

This question of general importance, whether procedures to compel the disclosure of grand jury minutes as a matter of right can be limited to prospective cases, should be decided by the Court.

CONCLUSION

For the foregoing reasons, as well as for those advanced by Petitioners Dave Evans and Salvatore Battaglia, Petitioner respectfully submits that the petition for a writ of certiorari should be granted.

Respectfully submitted,

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